BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

SAMIR GADELKARIM	)	
Claimant	)	
VS.	)	
	)	Docket No. 199,449
ATLAS VAN LINES	)	
Respondent	)	
AND	)	
	)	
LEGION INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent appealed Administrative Law Judge John D. Clark's December 16, 1999, Award. On May 12, 2000, the Appeals Board heard oral argument in Wichita, Kansas.

APPEARANCES

Claimant appeared by his attorney, Dale V. Slape of Wichita, Kansas. Respondent and its insurance carrier appeared by and through their attorney, Terry J. Torline of Wichita, Kansas.

RECORD

The Appeals Board has considered the record contained in the Award with one exception. The Administrative Law Judge included in the record the February 4, 1999, preliminary hearing transcript. Those proceedings took place post-award while this case was before the Kansas Court of Appeals. Therefore, the transcript and exhibits are not part of the original record and cannot be reviewed for purposes of this appeal.

STIPULATIONS

The Appeals Board adopts the stipulations listed in the Award.

ISSUES

The original award in this case was entered by Administrative Law Judge John D. Clark on August 26, 1997. The Administrative Law Judge found claimant had proven he injured his hands while performing heavy lifting and packing activities as a residential mover for the respondent as the result of a series of accidents through February 24, 1995. The Administrative Law Judge went on to conclude that claimant had not been taken off work by a physician and, therefore, was only entitled his outstanding medical expenses and no permanent disability.[1] Claimant appealed the Award to the Appeals Board.

In its February 26, 1998, Order, the Appeals Board likewise found claimant had proven he injured his hands at work. But the Appeals Board concluded claimant had also proven his bilateral hand injuries were the reason he had to leave work. Claimant's treating physician, Bernard F. Hearon, M.D., advised claimant, since the pain medication therapy he had prescribed had not relieved claimant's symptoms, there was nothing more he could do to treat the symptoms. Dr. Hearon recommended claimant "decease his work activities as his symptoms seemed to be aggravated by the heavy lifting he did at work." Claimant then followed the doctor's advice and terminated his employment with the respondent.

Because the parties would not agree for the Appeals Board to decide the other remaining issues, principally the nature and extent of claimant's disability, the case was remanded to the Administrative Law Judge for a decision on the other outstanding issues. Respondent, however, appealed the Appeals Board's February 26, 1998, Order to the Kansas Court of Appeals.

The Court of Appeals in a July 30, 1999, unpublished decision affirmed the Appeals Board's Order.[2] The Court of Appeals affirmed the Appeals Board's conclusion that claimant's bilateral hand injuries were caused by his work activities and the reason claimant left work was because of his hand injuries.

On remand, the Administrative Law Judge in the December 16, 1999, Award, that is the subject of this appeal, again reiterated his finding that claimant had proven his work activities, while employed by the respondent, caused his bilateral hand injuries. The Administrative Law Judge went on to find claimant was entitled to a 45 percent work disability based on a work task loss of 49 percent and a wage loss of 41 percent. Further, the Administrative Law Judge found claimant had a 4 percent preexisting functional impairment and reduced the work disability by that amount, entitling claimant to a 41 percent permanent partial general disability award.

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[1] *See* K.S.A. 44-501(c) and Boucher v. Peerless Products, Inc., 21 Kan. App. 2d 977, 911 P.2d 198, *rev. denied* 260 Kan. 991 (1996).

[2] Gadelkarim v. Atlas Van Lines, No. 80,846, unpublished opinion (July 30, 1999). *But see* Williams v. General Electric Co., No. 81,154, ____ Kan. App. 2d ____ (December 10, 1999) where the court held an order of remand by the Board is not a final order subject to appellate review.

On appeal, respondent again raises the issue that claimant failed to prove he suffered an accidental injury while employed by the respondent. Also, respondent contends, if claimant is entitled to a permanent partial general disability award, the award should be limited to his permanent functional impairment rating, because claimant voluntarily quit his employment with the respondent for reasons not related to his hand injuries. Additionally, respondent argues claimant is not entitled to a work disability because claimant, after he voluntarily quit his job with the respondent, would have earned wages at least equal to 90 percent of his pre-injury average weekly wage if he had not changed jobs for reasons not related to his hand injuries. Further, respondent disagrees with the Administrative Law Judge's finding in regard to claimant's pre-injury and post-injury average weekly wages.

Claimant, however, agrees with the Administrative Law Judge's Award and requests the Appeals Board to affirm the award.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs and the parties' arguments, the Appeals Board finds the Award should be modified.

Did claimant suffer an accidental injury that arose out of and in the course of his employment with respondent?

The Appeals Board finds this issue was previously decided affirmatively by the Administrative Law Judge in the original August 26, 1997, Award, affirmed by the Appeals Board's February 26, 1998, Order, and affirmed by the Court of Appeals' July 30, 1999, Memorandum Opinion. Claimant's testimony coupled with the opinions of claimant's treating physician, Bernard F. Hearon, M.D., and the independent examining physician, Paul D. Lesko, M.D., proved claimant suffered bilateral hand injuries while performing heavy lifting and repetitive work activities for the respondent.

What is the nature and extent of claimant's disability?

Respondent contends claimant left his employment voluntarily on February 24, 1995, for reasons not related to his hand injuries. Therefore, respondent argues, if claimant is entitled to a permanent disability award, the award should be limited to his permanent functional impairment and not a work disability.[3]

As previously found by the Appeals Board and affirmed by the Court of Appeals, the claimant left his employment because of his work-related hand injuries. Accordingly, the Appeals Board finds claimant is entitled to a work disability award, if the work disability exceeds claimant's permanent functional impairment rating.

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[3] *See* K.S.A. 44-510e.

There is only one functional impairment rating contained in the record. Orthopedic surgeon Paul D. Lesko, M.D., performed an independent medical examination of claimant at claimant's attorney's request. Dr. Lesko saw claimant on one occasion, March 7, 1996. Based on the AMA Guides to the Evaluation of Permanent Impairment, Third Edition (Revised), Dr. Lesko opined claimant had a 10 to 15 percent functional impairment to each hand, converted that functional impairment rating to a 13 percent functional impairment of each upper extremity, and in turn, converted that functional impairment rating to an 8 percent rating to the whole person. The doctor related claimant's hand injuries to the work activities claimant performed while employed by the respondent. He placed permanent restrictions on claimant's work activities of limited repetitive grabbing and grasping, limited lifting to 50 pounds, and limited use of power tools. Additionally, based on a history that claimant had hand symptoms in 1987 while working at Excel, Dr. Lesko opined the preexisting hand injuries contributed 50 to 60 percent to the current hand injuries.

Dr. Lesko was also shown a list of work tasks claimant had performed during the 15-year period preceding his February 24, 1995, accident. The work task list had been compiled by vocational rehabilitation expert Jerry Hardin and verified as accurate by the claimant at the regular hearing. Utilizing the permanent work restrictions he had imposed, Dr. Lesko concluded claimant had a 49 percent loss of ability to perform those work tasks. Dr. Lesko's work task loss opinion was the only opinion contained in the record and was, therefore, uncontradicted by the respondent.

The Appeals Board finds the claimant, as a result of his work-related hand injuries, has a 49 percent work task loss. In so doing, the Appeals Board rejects respondent's argument that Dr. Lesko's opinion is not credible because he testified the permanent work restrictions he placed on claimant only relate to the condition he found claimant on March 7, 1996, and does not relate to his condition as of February 24, 1995, accident date.

Respondent argues that claimant further aggravated and caused permanent injury to his hands as the result of driving a truck for other employers after February 24, 1995. Respondent points out claimant was treated by Tyrone D. Artz, M.D., in late 1995 and his medical records indicate claimant's driving of trucks at that time seemed to aggravate his hand condition. But Dr. Artz did not testify and his medical records were not stipulated into the record. The Appeals Board finds Dr. Artz's medical records are not part of the record of this case and thus, his opinions cannot be considered in deciding this case.[4]

What is claimant's pre-injury and post-injury average weekly wage?

On February 24, 1995, which is claimant's last day worked and his appropriate accident date, he was employed by the respondent as a truck driver moving household goods. Claimant not only had to drive the truck but also had to load and unload the households

[4] *See* K.S.A. 44-519 and Roberts v. J.C. Penney Co., 263 Kan. 270, 949 P.2d 613 (1997).

goods. The loading and unloading job duties was what primarily caused injury to his hands.

Claimant started working for the respondent in 1992. He was paid a percentage of the contract the respondent made with the customer. Therefore, since claimant was paid on a percentage basis, his average weekly wage is computed as provided for in K.S.A. 44-511(b)(5).

The respondent employed vocational expert Karen Crist Terrill to compute claimant's pre-injury and post-injury average weekly wages. The claimant employed certified public accountant John W. Siedhoff to express an opinion on claimant's pre-injury and post-injury average weekly wages.

Ms. Terrill reviewed receipts and expenses supplied by the claimant for 1994, 1995, and 1996. In accordance with the provisions of K.S.A. 44-511(b)(5), she computed claimant's total receipts minus his total expenses for the period of August 27, 1994, through February 24, 1995, which is a 26-week period before claimant's date of accident. Ms. Terrill found claimant to have a pre-injury average weekly wage of $1,209.46. For that same period, Mr. Siedhoff found claimant's pre-injury average weekly wage was $1,429.72. The primary difference in these two average weekly wage opinions is that Ms. Terrill made an error in computing the receipts and did not include income received by claimant from the respondent on December 30, 1994, in the amount of $6,960.81.

The Appeals Board, as did the Administrative Law Judge, finds Mr. Siedhoff's computation of claimant's pre-injury average weekly wage is the most accurate computation and, therefore, finds $1,429.72 is claimant's pre-injury average weekly wage.

After claimant left respondent's employment on February 24, 1995, he testified he then started working for FFE Transport on or about March 15, 1995. He went on to testify that between February 25, 1995, and the end of the year of 1996 he worked for six different trucking companies, including FFE.

Respondent contends claimant is not entitled to a work disability because, after claimant left respondent's employment, he changed employment for reasons not related to his hand injuries. Respondent argues, if claimant would not have changed employment as often as he did, he would have earned at least 90 percent of his pre-injury average weekly wage.

The trucking jobs claimant engaged in, after he terminated his employment with the respondent, all were jobs that did not require claimant to load and unload the freight. Claimant testified his frequent change of jobs was because of various disputes with his employers that were not related to his hand injuries. Claimant's testimony and the last information included in the record of claimant's income and expenses established that claimant's current employer, as of December 31, 1996, was A.L. Johnson Transport. Claimant had commenced his employment with A.L. Johnson on April 1, 1996.

Ms. Terrill found she was unable to separate out claimant's expenses for the period from claimant's date of accident of February 24, 1995, through December 31, 1995. Mr. Siedhoff, however, was able to separate those expenses and has computed claimant's post-injury average weekly wage for that period of time. The Appeals Board also finds Mr. Siedhoff's receipts and expenses, as set out in Exhibit No. 1 admitted into evidence at his deposition, as the most accurate information to utilize in computing claimant's post-injury average weekly wage.

Mr. Siedhoff found claimant's post-injury average weekly wage for the period from the February 24, 1995, accident date through December 31, 1996, was $845.89. This amount was determined by subtracting the total expenses for that period from the total receipts and dividing that total by 95, the number of weeks in the period. When claimant's pre-injury average weekly wage of $1,429.72 is compared to this post-injury average weekly wage of $845.89, there is a 41 percent loss. The Administrative Law Judge utilized 41 percent as the wage loss component of the work disability test. The 41 percent wage loss was then averaged with the 49 percent work task loss resulting in a work disability of 45 percent.

But respondent argues claimant's actual post-injury weekly earnings exceeded 90 percent or more of his pre-injury average weekly wage by at least March 16, 1996, even utilizing Mr. Siedhoff's wage information.

The Appeals Board acknowledges the difficulty of computing claimant's post-injury average weekly wage because we are dealing with a truck driver's income and expenses that are based either on a percentage of receipts and sometimes payment made by the mile. The Appeals Board finds that an accurate figure cannot be determine by either taking a segment of the total weeks worked or by averaging all of the total weeks worked. The Appeals Board finds, at least in this case, the most accurate and representative post-injury average weekly wage should be computed based on the claimant's income received during the time he was employed with each individual post-injury employer. The expenses incurred for each month that claimant was employed by the individual employers should then be subtracted to find the claimant's net income for each employer. The total number of weeks that claimant was employed by each employer should then be utilized to find claimant's post-injury average weekly wage.

As computed below, the Appeals Board finds claimant's permanent partial general disability for the period from February 25, 1995, the day following claimant's last day worked for the respondent, and December 31, 1996, the last day of wage information contained in the record, is as follows:

Post-Injury Employer	Dates of Employment	Number of Weeks	Post- Injury Average Weekly Wage	Percentage Wage Loss[5]	% of Perm. Partial Gen. Disability[6]
Unemployed	2/25/95 - 3/14/95	2.57	0	100[7]	74.5
FFE Transport	3/15/95 - 3/31/95	2.43	0	100	74.5
Burnham Services	4/1/95 - 8/31/95	21.86	$542.69	62	55.5
JME Transport	9/1/95 - 11/30/95	13.00	$1,059.57	26	37.5
Heartland Express	12/01/95 - 2/29/96	13.00	$420.72	71	60.0
Bekins Van Lines	3/1/96 - 3/31/96	4.43	$23.64	98	73.5
A.L. Johnson Trucking	4/1/96 - 12/31/96	39.29	$1,248.02	13	31

Should claimant's permanent partial general disability award be reduced by his preexisting permanent functional impairment?

If a worker's injury results from an aggravation of a preexisting condition, the recovery is limited to the extent the new injury causes increased disability. An award for the current injury shall be reduced by the amount of the preexisting functional impairment attributable to the preexisting condition.[8]

The Administrative Law Judge reduced claimant's permanent partial general disability award by 4 percent based on Dr. Lesko's opinion that claimant initially injured his hands in 1987 while working for Excel. Based on that history, Dr. Lesko concluded there was a 50 to 60 percent contribution from the preexisting injury suffered at Excel to the current hand

[5]The percentage wage loss is found by comparing claimant's $1,429.72 pre-injury average weekly wage with the post-injury average weekly wage.

[6]The work disability percentage is found by averaging claimant's 49 percent work task loss with the wage loss percentage as required by K.S.A. 44-510e.

[7]During this 2.57 week period, claimant was unemployed. But since claimant found work within this short period of time, the Appeals Board finds claimant made a good faith effort to find appropriate employment and, therefore, his wage loss is found to be 100 percent. *See* Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[8]*See* K.S.A. 44-501(c).

injuries. Dr. Lesko's permanent functional impairment was an 8 percent whole person rating. Therefore, the Administrative Law Judge reduced claimant's permanent partial general disability award by 4 percent. It is critical that a preexisting condition actually constitute an impairment in that it somehow limited the individual's abilities or activities. Unknown, asymptomatic conditions that are neither disabling nor otherwise constitute an impairment cannot serve as a basis to reduce an award. But, in this case, Dr. Lesko's opinion was uncontradicted by claimant and claimant did not raise this issue before the Appeals Board.

The Appeals Board, therefore, affirms the Administrative Law Judge's finding that claimant's permanent partial general disability award should be reduced by the 4 percent permanent functional impairment that pre-existed claimant's February 24, 1995, accident and resulting hand injuries.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that Administrative Law Judge John D. Clark's December 16, 1999, Award should be, and is hereby modified as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Samir Gadelkarim and against the respondent, Atlas Van Lines, and its insurance carrier, Legion Insurance Company, for an accidental injury which occurred on February 24, 1995, and based upon an average weekly wage of $1,429.72.

Claimant is entitled to 2.57 weeks of permanent partial disability compensation at the rate of $319.00 per week or $819.83 for a 70.5%[9] permanent partial general disability, followed by 2.43 weeks of permanent partial disability compensation at the rate of $319.00 per week or $775.17 for a 70.5% permanent partial general disability, followed by 21.86 weeks of permanent partial disability compensation at the rate of $319.00 per week or $6,973.34 for a 51.5% permanent partial general disability, followed by 13 weeks of permanent partial disability compensation at the rate of $319.00 per week or $4,147.00 for a 33.5% permanent partial general disability, followed by 13 weeks of permanent partial disability compensation at the rate of $319.00 per week or $4,147.00 for a 56% permanent partial general disability, followed by 4.43 weeks of permanent partial disability compensation at the rate of $319.00 per week or $1,413.17 for a 69.5% permanent partial general disability, followed by 54.76 weeks of permanent partial disability compensation at the rate of $319.00 per week or $17,468.44 for a 27% permanent partial general disability, making a total award of $35,743.95.

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[9] Please note all the percentages of permanent partial general disability, contained in the computation of the Award, have been reduced by 4% preexisting functional impairment as found above.

As of September 29, 2000, the entire award of $35,743.95 is all due and owing and is ordered paid in one lump sum less any amounts previously paid.

All authorized medical expenses are ordered paid by the respondent.

Future medical is awarded upon proper application to and approval by the Director of the Division of Workers Compensation.

An unauthorized medical allowance of up to $500.00 is awarded upon presentation to the respondent of an itemized statement verifying same.

Claimant's attorney fee contract is hereby approved insofar as it is not inconsistent with K.S.A. 44-536.

All remaining orders contained in the Award are adopted by the Appeals Board.

IT IS SO ORDERED.

Dated this _____ day of September 2000.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Terry J. Torline, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director